

DD / S R 4 - 1 S T R S
FILE *Personnel !!*

19 NOV 1971

MEMORANDUM FOR THE RECORD

SUBJECT: Equal Employment Opportunities Enforcement Act of 1971

Harry Fisher, Director of Personnel, will query Bernard Rosen, Executive Director, Civil Service Commission, regarding CSC position and/or John Warner, Deputy General Counsel, will query Anthony Mondello, CSC General Counsel. Depending on outcome, we will decide whether to do nothing, take direct action for language change or get "interpretation" from Bill "manager" in the Senate.

RSW/ms
Robert S. Wattles
Assistant Deputy Director
for Support

ADD/S:RSW/ms (19 Nov 71)

Distribution:

- Orig - DD/S Subject, *✓* w/Background (DD/S 71-4355)
- 1 - DD/S Chrono
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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM:

Director of Personnel
5 E 56 HQ

EXTENSION

NO.

DATE

71-4355
22 NOV 1971

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. Deputy Director for Support
7 D 18 HQ

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We have very recently become aware of the progress being made in Congress on the Equal Employment Opportunities Enforcement Act of 1971. The House version (HR 1746) gave us no problem because it omitted reference to Federal employment. On 28 October 1971 the Senate Labor Committee reported out its version of the Bill (S 2515) which would have serious impact on the Agency. The Senate as a whole must still act on the Senate Bill and then it would go to committee.

Apparently OLC is waiting for guidance from someone (see memo to Bill Bavis). I believe we should meet with OLC representatives as soon as possible to urge action on their part to restrict coverage by the Act to the competitive service. Perhaps OGC representatives should also participate.

I have attached pertinent correspondence and a summary prepared by Bob Freeman.


Harry B. Fisher
Director of Personnel

ADMINISTRATIVE
INTERNAL USE ONLY

10 November 1971

MEMORANDUM FOR: Director of Personnel

SUBJECT : Equal Employment Opportunities Enforcement
Act of 1971

AT REFERENCE : Note of 8 November to Bill Bavis,
Same Subject (Copy Attached)

1. The House on 16 September 1971 approved H.R. 1746, a bill to promote equal employment opportunities for American workers. The House bill, by omitting reference to discrimination in Federal employment, would not affect the Agency but would give the CSC continuing jurisdiction over the Government's EEO program and would permit the EEO Commission to go into the U. S. District Courts on charges of discrimination. Individual Federal employees who considered themselves aggrieved could seek relief in the courts under Title VII of the Civil Rights Act of 1964 but would have to act as private individuals and take their chances on the time-consuming, expensive procedures involved.

2. Following favorable action by the House the Senate Labor Committee, on 28 October 1971, reported its version of the bill, S. 2515, Equal Employment Opportunities Enforcement Act of 1971, which would give stronger rights to Federal Employees and greater powers to the Civil Service Commission in cases of alleged discrimination. The Senate bill would apply to Agency employees and applicants for employment and would provide as follows:

a. All personnel actions affecting employees or applicants for employment. . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

b. The CSC shall have authority to enforce the provisions of subsection a. . . and shall be responsible for (1) review and approval of an annual EEO plan which each agency and department shall submit. . . and (2) review and evaluation of agency EEO programs, obtaining and publishing on at least a semiannual basis progress reports from each agency. . .

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The Senate bill further provides that agency heads must comply with CSC rules, regulations, orders and instructions, and must notify any employee or applicant for employment of the final action taken on any complaint of discrimination filed under provisions of this bill. Employees would have the right to sue the Government for appointments and promotions within the following time limits: within 30 days after an agency ruled against his appeal; again within 30 days if he should appeal to the CSC and be turned down; within 180 days if neither the agency nor the CSC acted on his discrimination complaint after it was filed.

AT 3. The principal threat to the Agency lies in the fact that it would apply both to employees and to applicants for employment; would give the CSC inspection, appeal and enforcement powers; and would give aggrieved applicants or employees the right to file civil actions. Obviously, as [redacted] has pointed out, these provisions would impair the Director's authorities and responsibilities with respect to personnel management and protection of Agency information.

4. It seems to me that the Legislative Counsel should move rapidly to repeat the actions taken in 1970 when similar legislation was proposed, and seek either exemption for the Agency, or inclusion of language to make the bill's provisions applicable only to the competitive service.

5. In addition to the referent memorandum, I have attached copies of OLC's material from last year; pertinent extracts from the Committee Report on S. 2515; and Joseph Young's analysis of the bill as published in his weekly news digest of 8 November 1971.



Deputy Director of Personnel
for Recruitment and Placement

Attachments

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8 November 1971

NOTE FOR: Mr. Bavis

SUBJECT: Equal Employment Opportunity Act

1. Per our telecon of Friday, attached is the Senate report on S. 2515, Equal Employment Opportunities Enforcement Act of 1971, which deals with nondiscrimination in Federal employment. The proposed statutory provisions are found on pages 71 and 72, clipped. Your attention is invited to subsections dealing with application of the law (717(a)) and access to courts (717(c)).

2. In sum, as presently written the section would apply to Agency employees and applicants, give the Civil Service Commission overview, appeal and enforcement powers, and give an aggrieved applicant or employee the right to file a civil action.

3. Thus the bill could be viewed as subordinating the Director's responsibility to protect intelligence sources and methods, impairing his existing authority to terminate employees, and posing the classic dilemma of either revealing (outside of the Agency within the Executive Branch or within the judicial system) secrets to defend against an alleged grievance which has no foundation or, by inaction to preserve security, permitting the alleged aggrieved to win with no contest.

4. In view of the fact that the House has already acted favorably on its version of this legislation (H. R. 1746, which hopefully you have had previously) and the Senate has reported out a bill, there is an urgent need for fast action. As I told you, the House dropped entirely from its version of the bill the section dealing with discrimination in Federal employment.



Assistant Legislative Counsel

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22 September 1970

MEMORANDUM FOR THE RECORD

SUBJECT: Conversation with Bob Vagley, on the Staff of the House Committee on Education and Labor

1. I talked today with Bob Vagley about our views on the Equal Employment Opportunities Enforcement legislation. Both the Senate and House bills (S. 2453 and H.R. 17555) have been reported by their respective committees and the Senate bill is on the Senate calendar. I told Vagley that we would not be included in the definition of employees in the House bill, but would be covered by the terms of the comparable language in the Senate bill. I then pointed out the problem we would have if Agency employees and applicants could file suits in the courts under this legislation. I compared this with the similar situation that would exist in Senator Ervin's so-called Bill of Rights for Government Employees (S. 782) and assumed that this could leave all Government agencies open to harassment through suits by persons who would file application for Government employment and then allege violations of the provisions of the act.

2. Vagley said he could see how this would be a problem and said he would do everything he could for us in the House. He went on to say he doubted very seriously that the House Rules Committee would grant a rule for consideration of this legislation in the House this year, especially if the Congress adjourns by the end of October. He suggested that we also discuss our problem with Eugene Mittelman, of the Senate Labor and Public Welfare Committee staff.


Deputy Legislative Counsel


Distribution:

Orig. - Subj.

1 - OGC

1 - OPR

OLC/GLC:rw (23 Sep 70)

1 - Mr.  (DDS)

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EXCERPT FROM JOURNAL
OFFICE OF LEGISLATIVE COUNSEL

Wednesday - 23 September 1970

3. (Internal Use Only - LLM) Spoke with Miss Ethel Bixler, in the Civil Service Commission, concerning the Equal Employment Opportunity Enforcement Act bills that are now active on the Hill. She reviewed the Commission's opposition to the section applying to Federal employees and reported that action is more likely in the Senate where it is on the calendar than the House where the Rules Committee is an additional hurdle. Miss Bixler was not in the position to say what the recommendations of the Commission might be to the Office of Management and Budget if the legislation is approved by this Congress.

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EXCERPT FROM JOURNAL
OFFICE OF LEGISLATIVE COUNSEL

Thursday - 24 September 1970

7. (Internal Use Only - LLM) As suggested by Bob Vagley, House Education and Labor Committee staff, to Mr. [] called Eugene Mittelman, Minority Counsel, Senate Labor and Public Welfare Committee, and discussed the prospects of favorable Senate action on S. 2453 (Equal Employment Opportunity Enforcement Act). He said the prospects are as good as they have been for some time but identified a number of hurdles. I briefly identified our interest and the distinction between the Senate and House bills on the Federal employee provision. Mittelman said it was not their intent to apply this provision to the noncompetitive service and he was thankful that we had brought his attention to the fact that the language in the Senate bill could be interpreted otherwise.

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gmm
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11 September 1970

MEMORANDUM FOR THE RECORD

SUBJECT: Equal Employment Opportunities Enforcement Act
(H. R. 17555, S. 2453)

1. On 21 August 1970 both the Committee on Education and Labor in the House and the Committee on Labor and Public Welfare in the Senate favorably reported bills providing a method for enforcing the rights of workers under the Civil Rights Act of 1964, as amended.

2. Of concern to the Agency is that the reported out bills: (1) transfer the equal employment opportunity functions pertaining to federal employees now assigned by executive order to the Civil Service Commission to the Equal Employment Opportunity Commission, and (2) authorize an aggrieved employee or applicant to file a civil action against the head of an agency if aggrieved by the final disposition of his complaint by the EEOC.

3. The provision of concern to the Agency differs in each bill as can be seen in the appropriate sections attached hereto. There is no question that the Agency is covered by the terms of section 715 of the Senate bill (S. 2453), which becomes effective one year after date of enactment of the bill. On the basis that the Agency is not normally considered to be service within the "competitive service" the Agency would not be affected by section 717 of the House bill (H. R. 17555), which becomes effective six months after enactment.

4. Arguments against these employee/applicant provisions parallel those made against the Ervin bill.



Assistant Legislative Counsel

Distribution:

Orig - Subj

1 - Chrn

OLC/LLM:smg (11 Sept. '70)

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Sec. 719. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), and in those portions of the government of the District of Columbia, and the legislative and judicial branches of the Federal Government having positions in the competitive service, shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) The Equal Employment Opportunity Commission shall have authority to enforce the provision of subsection (a) and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities hereunder, and the head of each executive department and agency and the appropriate officers of the District of Columbia shall comply with such rules, regulations, orders, and

instructions: Provided, That such rules and regulations shall provide that an employee or applicant for employment shall be notified of any final action taken on any complaint filed by him thereunder.

(c) Within thirty days of receipt of notice, given pursuant to subsection (b) or a previously issued Executive order, of final action taken on a complaint of discrimination based on race, color, religion, sex, or national origin, or after ninety days from the filing of the initial charge until such time as final action may be taken, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706(q), in which civil action the head of the executive department or agency, or the District of Columbia, as appropriate, shall be the respondent.

(d) The provisions of section 706 (q) through (w), as applicable, shall govern civil actions brought hereunder.

(e) All functions of the Civil Service Commission which the Director of the Office of Management and Budget determines relate to nondiscrimination in Government employment are transferred to the Equal Employment Opportunity Commission.

(f) This section shall become effective one year after the date of enactment of this Act.

(g) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution, statutes, and Executive orders.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717.¹ (a) All personnel actions affecting employees or applicants for employment in the competitive service (as defined in section 2102 of title 5 of the United States Code) or employees or applicants for employment in positions with the District of Columbia government covered by the Civil Service Retirement Act shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) The Equal Employment Opportunity Commission shall have authority to enforce the provision of subsection (a) and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities hereunder, and the head of each executive department and agency and the appropriate officers of the District of Columbia shall comply with such rules, regulations, orders, and instructions: Provided, That such rules and regulations shall provide that an employee or applicant for employment shall be notified of any final action taken on any complaint filed by him thereunder.

(c) Within thirty days of receipt of notice given under subsection (b), the employee or applicant for employment, if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 715, in which civil action the head of the executive department or agency, or the District of Columbia, as appropriate, shall be the respondent.

(d) The provisions of section 715 shall govern civil actions brought hereunder.

(e) All functions of the Civil Service Commission which the Director of the Bureau of the Budget determines relate to nondiscrimination in government employment are transferred to the Equal Employment Opportunity Commission.

EFFECT UPON OTHER LAW

SEC. 718. Nothing contained in this Act shall relieve any government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution, statutes, and Executive orders.

TITLE 5, UNITED STATES CODE

§ 5314. Positions at level III.

Level III of the Executive Schedule applies to the following positions, for which the annual rate of basic pay is \$40,000:

* * * * *

(55) Chairman, Equal Employment Opportunity Commission.

§ 5315. Positions at level IV.

Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay is \$38,000:

* * * * *

(72) [Chairman] Members, Equal Employment Opportunity Commission (4).

* * * * *

¹ Effective six months after date of enactment.

SECTION 10

Section 715.—This section transfers all of the powers and duties of the Secretary of Labor under Executive Order 11246 (as amended by Executive order 11375) to the Equal Employment Opportunity Commission. Executive Order 11246 enunciates the policy of the Government of the United States "... to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. . ." (E.O. 11246 § 101 as amended). The Executive order program is presently administered within the Department of Labor by the Office of Federal Contract Compliance, a division of the Employment Standards Administration. The section contemplates the transfer of all of the OFCC program functions related to Executive Order 11246, as amended. This section does not relieve any of the Government procurement agencies of their responsibilities under the executive order.

The present section 715 relating to a special study by the Secretary of Labor is repealed by the substitution of the new provisions. That study has been completed and the section has no more effect.

SECTION 11

Section 717(a).—This subsection would make clear that personnel actions of the U.S. Government affecting employees or applicants for employment shall be made free from any discrimination based on race, color, religion, sex, or national origin. All employees subject to the executive branch and Civil Service Commission control or protection are covered by this section.

Section 717(b).—Under this subsection, the Civil Service Commission is given the authority to enforce the provisions of subsection (a) through appropriate remedies. These remedies may include back pay for applicants, as well as employees, denied promotion opportunities, reinstatement, hire, immediate promotion and any other remedy needed to fully recompense the employee for his loss, both financially and professionally. The Civil Service Commission is also given authority to issue rules and regulations necessary to carry out its responsibilities under this section. The Civil Service Commission also shall annually review national and regional equal employment opportunity plans and be responsible for review and evaluation of all agency equal employment opportunity programs. Finally, agency and executive department heads and officers of the District of Columbia shall comply with such rules and regulations, submit an annual equal employment opportunity plan and notify any employee or applicant of any final action taken on any complaint of discrimination filed by him.

Sections 717(c) and (d).—The provisions of sections 706(q) through (w) concerning private civil actions by aggrieved persons are made applicable to aggrieved Federal employees or applicants. They could file a civil action within 30 days of notice of final action

on a complaint made pursuant to section 717(b), or after 180 days from the filing of an initial charge, or an appeal with the Commission. The authority given to the Commission or the limitations placed upon the Commission under sections 706(q) through (w) would apply to the Civil Service Commission or the agencies, as appropriate, in connection with a civil action brought under section 717(c). So, for example, if the Civil Service Commission or agency does not issue an order within 180 days after a complaint or appeal is filed, the aggrieved person may also institute a civil action. If such action is instituted within one year of the filing of the complaint or appeal, the Civil Service Commission or agency may request that the action be stayed or dismissed upon a showing that it has been acting with due diligence, that it anticipates issuance of an order within a reasonable time on the complaint or appeal, that the case or proceeding is exceptional and that extension of exclusive jurisdiction of the Civil Service Commission or agency is warranted.

Section 717(e).—This subsection provides that nothing in this act relieves any Government agency or official of his existing nondiscrimination obligations under the Constitution, other statutes, or his or its responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SECTION 12

Section 716 is amended to provide for consultation of the Attorney General, the Chairman of the Civil Service Commission, and the Chairman of the Equal Employment Opportunity Commission regarding rules, regulations and policy in the performance of their responsibilities under this act. It does not in any way limit each of the officials in independently carrying out their respective obligations under this title.

SECTION 13

This section provides that the amended provisions of section 706 concerning the cease and desist enforcement powers would not apply to charges filed with the Commission prior to the effective date of this act. In addition, those new or amended sections of title VII not specifically stated in this section to be inapplicable to current charges, such as the amendments to sections 705, 707, 709, 710, 713, and 715 would cover existing charges.

In Reply on 5.25/5

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opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

(d) In the performance of their responsibilities under this Act, the Attorney General, the Chairman of the Civil Service Commission and the Chairman of the Equal Employment Opportunity Commission shall consult regarding their rules, regulations and policies.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission in those unit of the Government of the District of Columbia having positions in the competitive service, and in the legislative and judicial branches of the Federal Government having positions in the competitive service, shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) The Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement of hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in section 717 (a) shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717 (a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit, on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after 180 days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 (q), in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706 (q) through (w), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

Sec. 13 of S. 2515 reads as follows: The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall not be applicable to charges filed with the Commission prior to the enactment of this Act.)

*From Joseph Young to Niles Diggs
2 Nov 51*

- 3 -

Should all attempts fail in the Congress, federal classified employees will get their next pay raise in July, and it is expected to average at least 5.5 percent.

Federal blue collar employee hopes of easing of the six-month pay delay depend on what happens to federal classified pay legislation in Congress.

SENATE UNIT OKAYS JOB BIAS BILL--The Senate Labor Committee has approved a bill which would give stronger rights to federal employees and greater enforcement powers to the Civil Service Commission in cases involving discrimination charges.

Federal employees who now charge they have been denied promotions or appointments because of race, religion or sex have very limited opportunity to take their cases to the federal courts.

While some courts have agreed to accept these cases, most have not. Only recently the 6th Circuit U.S. Court of Appeals dismissed such a case, upholding the government's motion for dismissal on grounds of sovereign immunity.

However, the bill sponsored by Sen. Harrison Williams, D-N.J., would give federal employees the right to sue the government for promotions and appointments.

An employee could go to a federal court 30 days after an agency ruled against his appeal. If he then appealed to the CSC and were turned down again, he could go into federal court within 30 days. If neither the agency nor the CSC had acted on the discrimination complaint within 180 days after it was filed, the employee also could go to court.

The measure would have the CSC retain jurisdiction over the government's equal employment opportunity program, although the main thrust of the bill would be to strengthen enforcement powers of the Equal Employment Opportunity Commission. There had been some sentiment in the committee to transfer the government's EEO program to the EEOC, but it was decided to keep it under the CSC.

The bill would strengthen the CSC's enforcement powers by giving it the authority of substantive law instead of a presidential executive order.

The commission would be given the responsibility and power to investigate the various departments and agencies' equal opportunity programs to make certain that discrimination practices against blacks, women, Spanish-speaking Americans and others are stopped and that affirmative action programs are adopted.

The House already has approved a bill which would have the CSC retain jurisdiction over the government's EEO program. However, the House measure would not permit federal employees to go in to court in these cases, nor would it beef up the CSC's enforcement powers. These matters eventually must be settled in House-Senate conference.

ARMY ACCUSED--The Army Department has embarked on a campaign to undercut its own equal employment opportunity program, the National Association of Government Employees has charged.

NAGE said that in two different cases ruled on by the Office of the Secretary of the Army, findings of racial discrimination against black employees of Frankford Arsenal in Philadelphia by Civil Service Commission appeals examiners have been rejected.

"Incidents such as these lead the NAGE to the reluctant conclusion that trying to assure equal employment opportunity for civilian employees of the Army is an exercise in futility," the union said.

MERGER DIMMING--The possibility of merger between the postal clerk and letter carrier unions has been clouded by an action of the carriers' executive council.

The council voted last week to hold out for separate inside and outside--clerk